PD-0955-19
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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JONATHAN WILLIAM DAY,	§	
Appellant	§	
	§	
VS.	§	**NO. PD-0955-19**
	§	
THE STATE OF TEXAS,	§	
Appellee	§	

REPLY BRIEF

APPEALED FROM CAUSE NO. 1498320 IN THE COUNTY CRIMINAL COURT NO. 1 OF TARRANT COUNTY, TEXAS

ORAL ARGUMENT IS NOT REQUESTED

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State filed an information charging Appellant with the misdemeanor offense of evading arrest. CR 6. Appellant pled not guilty. RR III – 13. A Tarrant County jury found him guilty. RR III – 161. After hearing evidence, the trial court sentenced Appellant to 220 days in jail. RR IV – 42.

On appeal, among other things, Appellant complained that the evidence was insufficient to find him guilty of evading arrest as there was no proof that his detention was lawful. A panel of the First Court of Appeals agreed with this argument, reversed the trial court's judgment, and remanded the case with instructions to enter an acquittal. *Day v. State*, No. 01-18-00289-CR, 2019 WL 2621740 at *3-4 (Tex. App.—Houston [1st Dist.] June 27, 2019) (not designated for publication).

The State Prosecuting Attorney filed a motion for rehearing with the court of appeals, which was overruled. It then filed a petition for discretionary review with this Court. That petition was granted.

STATEMENT OF FACTS

C.W. Heizer is a city Marshal for Richland Hills. RR III – 65. On May 15, 2015, he pulled up to a residence to serve a warrant on a man named Danny Branton. RR III – 67. Heizer saw two bicyclists pull into the driveway. RR III – 67, 69. Concerned that one of the men might have been Branton, Heizer got out of his car to approach them before they got inside the house. RR III – 69. As he was getting out, Heizer saw two cars come by and park in the same driveway. RR III – 70. Heizer walked toward the driveway. RR III – 70.

One of the vehicles was a white SUV that was being driven by Appellant. RR III – 71. Appellant got out of his car and was talking to one of the bicyclists. *Id*. There was a total of six people in the driveway. RR III – 72. As he approached, Heizer asked the men who Danny Branton was. RR III - 72. No one answered. RR III - 72. The man who was in the other truck, a Mr. Acorn, started his vehicle. RR III – 72. Thinking he was trying to leave, Heizer approached that truck. RR III – 73. He asked for identification from all the men. RR. III - 73. Appellant handed him an ID. RR III – 74. Acorn said he didn't have any ID, and Heizer told him he would not be able to leave and had him turn off his truck. RR III

– 74-75. Heizer noticed a woman in the back seat of the truck. RR III – 76. As he was dealing with her, another man in the passenger side of Acorn's car got out and walked into the house. RR III - 76.

Heizer believed that one of the men was Danny Branton – but he didn't know who. RR III – 69. After looking at Appellant's ID, Heizer determined that he was not Branton. RR III – 88. However, Heizer felt the men in the driveway were not being "truthful" with him. RR III – 78. He began to call in everyone's names to check for warrants. RR III - 78. Appellant indicated that he needed to get to work and wanted to leave. RR III – 78. Heizer testified that he told him, "I'm trying to figure everything out. You got to – I just – you got to wait." RR III - 78. He clarified that he meant "trying to figure out who Danny is or where he is," and "what everybody's doing at the house." RR III – 79. Heizer did not want to let Appellant leave because he did not think he was being honest about the whereabouts of Branton. RR III – 79. Appellant told Heizer he had warrants "out of Fort Worth." *Id*. In response, Heizer said, "I'm not worried about a Fort Worth traffic warrant." RR III - 79.

Heizer, however, ran warrant checks on everyone there. RR III – 80. Appellant had a warrant out of Haltom City. RR III – 90. Appellant walked toward his white SUV and said he needed to make a phone call. RR III – 82. Heizer gave him permission. RR III - 82. Appellant locked the car, then walked around to the front. RR III – 84. Heizer told him that he couldn't leave, that he was under arrest. RR III – 84. Appellant then took off running

down the street. *Id*. Other officers caught up to him two blocks away. RR III – 94. Appellant was found guilty of evading arrest. RR III – 160.

The trial court assessed a punishment of 220 days in jail. RR IV - 42.

SUMMARY OF THE ARGUMENT

Appellant fled from an illegal detention. Although there was evidence that there were outstanding warrants for Appellant's arrest, the officer's contradictory statements to Appellant about why he was being detained made it impossible for a rational juror to determine if Appellant *knew* that he was being detained for a lawful reason. Further, exclusionary rule concepts like attenuation of the taint should have no place in determining if a detention is "lawful" for purposes of evading arrest.

ARGUMENT AND AUTHORITIES

The First Court of Appeals got it right: the evidence was insufficient to sustain Appellant's conviction for evading arrest or detention. First, given that there was no legal reason to prolong Appellant's detention beyond that necessary to ascertain that he wasn't the fugitive the officer was looking for, the State failed to prove that Appellant knew his detention was lawful. Second, assuming that the officer intended to arrest Appellant on warrants, the existence of those warrants could not have turned an earlier, unlawful

detention into a lawful one. Third, the State should find no solace in post hoc, exclusionary rule-based justifications for the initial unlawful detention.

I. A defendant must *know* that a detention is lawful

The State acknowledges that the question of whether the prosecution must prove that a defendant "knows" he is being lawfully arrested or detained is an issue before this Court. *Nicholson v. State*, No. PD-0963-19 (Defendant's PDR granted on December 18, 2019); s*ee* State's brief at 7 n.21. However, the State also opines that Appellant "undoubtedly" knew that his arrest was lawful. *Id*. Appellant takes issue with that view.[1]

The court of appeals held that Appellant was not lawfully detained, as any justification for a continued detention evaporated as soon as Marshal Heizer determined that Appellant was not the man he was looking for. *Day*, 2019 WL 2621740 at *3. It is undeniable that Marshal Heizer was aware that Appellant was not Danny Branton *before* doing a warrant check. In fact, his sole purpose in continuing to detain Appellant was because he thought Appellant (or the others) knew where Branton was. *See* RR III – 79.[2] In an astounding attempt at mind-reading, the State presumes that Heizer's "intrusion. .

[1] At the risk of cheerleading for Nicholson and without rehashing the arguments in that case, Appellant is convinced that the force of logic supports Nicholson's arguments in this Court and that a suspect's knowledge that an officer is detaining him "lawfully" must be proved in an evading arrest case.

[2] Prosecutor: And even after you maybe realized he gave you an ID that said he wasn't Danny Branton, did you believe he was being honest with you about if he knew where Danny was?
Heizer: No.
Prosecutor: So you were investigating that at this point, is that -- I mean is that why you don't let him go?
Heizer: That, the ID I was handed, everything with him driving.

.appeared to have been made in good faith." State's brief at 19. No – Heizer was most likely irritated because he wanted to find Branton and didn't get the help from bystanders that he demanded. In any event, as the Court of Appeals correctly found, there was no need to continue detaining Appellant after it had been established that he was not Branton.

As the State appears to now implicitly concede that this continued detention was indeed unlawful, that aspect of the court of appeals' opinion can be put to one side. The State now argues that this unlawful detention doesn't matter – that a valid arrest warrant existed for Appellant which essentially mooted out any prior constitutional incongruities on the part of Marshal Heizer. State's brief at 9.

But Appellant's knowledge of this warrant – and arrest – is precisely what's at issue. First, any confusion over this matter can be laid squarely at Heizer's feet. When he was initially detained, Appellant volunteered the information that he had "warrants out of Fort Worth." RR III – 79. Heizer replied that he was not interested: "I said, 'I'm not worried about traffic warrants out of Fort Worth. I'm just here to deal with my warrants.'" RR III – 80. Any reasonable person would take that to mean that Heizer was only going to serve the warrant he came there with – the one on Branton. Thus, as far as Appellant knew, he was in the clear.

Apparently, there was another warrant. RR III – 81. However, it is unclear exactly how this was communicated to Appellant. Certainly, it was not clear that he was going to

be arrested on this warrant. At best, Appellant heard conflicting information: no, I'm not going to arrest you on this Fort Worth warrant (RR III – 79) and hey, don't go anywhere, you're under arrest (RR III – 92). In sum, faced with contradictory statements from Marshal Heizer, it cannot be said beyond a reasonable doubt that Appellant knew that Heizer was trying to validly arrest him.

The State argues that an arrest "based on a facially valid warrant is always lawful." Perhaps so. But the State's interpretation of the facts in Appellant's case muddies what actually happened. It is a fact that Appellant was not "arrested" based on a facially valid warrant for the simple reason that he left before that could occur. Heizer testified that it was his *intention* to arrest Appellant – and he could have done so – but Appellant had already left the *detention*, the basis of which was Heizer's fruitless search for Branton. This was, in fact, the State's apparent theory of the case, that Appellant evaded the initial detention by running off.

II. Neither the existence of a warrant nor exclusionary rule justifications can turn an unlawful detention into a lawful one

The State appears to think that the mere existence of an arrest warrant will vitiate any misconduct on the part of a detaining officer. But this misses an important element of the offense – a defendant must have knowledge that the officer is attempting to arrest him. *See Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986) ("it is essential that a defendant know the peace officer is attempting to arrest him"). In the confusing atmosphere

of the moment, it wasn't even clear what warrants were at issue. Heizer, after all, had already told Appellant he didn't care about the Fort Worth warrants. Heizer was (at least in his testimony) more concerned about the other warrants, but his intent to arrest Appellant on these warrants was not communicated to him, at least not in a way that could constitute proof beyond a reasonable doubt.

The State relies in large part on the Supreme Court's opinion in *Utah v. Strieff*, 136 S.Ct. 2056 (2016), emphasizing that the discovery of a warrant rendered a later seizure of the defendant "perfectly lawful despite the earlier illegality." State's brief at 10. The problem with this reliance is that *Strieff* answers the wrong question. A suspect may, of course, be arrested pursuant to a valid warrant. But the issue in Appellant's case is whether he fled an illegal investigative detention, not whether he was evading an arrest. That was certainly the State's theory of the case at trial, the theory propounded and argued to the jury. *See, e.g.*, RR III – 158 (State's jury argument: "When the officer says, 'Stay right here because I'm investigating something,' and you take off running, that's not taking responsibility for your actions.").

In addition, the arrest warrant in *Strieff* validated the actual arrest (and subsequent discovery of evidence) – not the initial suspicion less stop. In fact, the point was never whether the stop was lawful. The Supreme Court's opinion made this abundantly clear, mainly by prefacing practically every discussion of the stop with the word "unlawful." *See*,

e.g., *Strieff*, 136 S.Ct. at 2061 ("The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence…"); *Id*. ("It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person."). No reading of *Strieff* would cause one to question whether the detention of Appellant was unlawful. A later warrant simply wouldn't change that.

The State quite sensibly argues that the exclusionary rule has little place in an analysis of an "unlawful detention" under the evading statute. *See* State's brief at 11-13. But then it turns around and asserts that both the independent source doctrine and attenuation of the taint should render the illegal detention of Appellant valid. *Id*. at 17-19. The problem with this analysis is that it ignores the plain wording of the statute: the arrest or detention must be "lawful." Tex. Penal Code § 38.04(a). This means, at a minimum, that the detention must be lawful at its inception. No authority countenances the idea that a constitutional violation can be rendered valid because of a post hoc justification. Indeed, these justifications are the product of the exclusionary rule, that is, whether or not evidence obtained after the constitutional violation should be excluded. *See Segura v. United States*, 468 U.S. 796, 804 (1984).

Here, if the initial detention was unlawful, it remained that way. In other words, attenuation or not, there was still a taint. And the statute makes explicit that an arrest or

detention must be lawful.

Finally, it should be pointed out that this jury was not called upon to determine such legal arcana as whether the taint was attenuated – nor should it have been. It is axiomatic in this country that juries are not summoned to decide pure questions of law. *See Sparf v. United States*, 156 U.S. 51, 105-06 (1895). Instead, juries routinely decide on the application of a legal standard to a given set of facts, the so-called "mixed question" of law and fact. *See United States v. Gaudin*, 515 U.S. 506, 512 (1995) (holding that a determination of "materiality" under federal criminal statute is an appropriate inquiry for the jury). But a jury called on to decide this mixed question *must* be adequately guided in making its determination. *See id*. at 513 ("the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions") (*citing Sparf, supra*).

The State's invocation of an attenuation-of-the-taint standard for evading cases does nothing less than place a pure question of law before the jury. As a practical matter, it is impossible for jury instructions to anticipate every argument and counterargument to the legal question of what constitutes a "lawful" stop. The charge in Appellant's case, for example, instructed the jurors what would constitute reasonable suspicion to effect a detention. CR 78. But it is beyond the capability of a mere jury charge to indulge in every possible Fourth Amendment argument – such a set of instructions would approach the size of Wayne LaFave's treatise on search and seizure.

Accordingly, this Court should decline the State's invitation to justify a conviction under the evading statute by referring to legal doctrines which could never have been considered by the jury.

CONCLUSION AND PRAYER

Appellant was detained for no other reason than the officer was annoyed that he couldn't find who he was looking for. The discovery of a warrant for Appellant's arrest did not change the fact that this detention was unlawful. Therefore, the First Court of Appeals correctly held that the evidence was insufficient to justify Appellant's conviction for evading detention. Appellant accordingly prays that this Court affirm the First Court's decision and overrule the State's arguments to the contrary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert K. Gill, attorney for Appellant, do hereby certify that a true and correct copy of the above and foregoing Brief of the Appellant has been e-served to Emily Johnson-Liu, Assistant State Prosecuting Attorney at information@spa.texas.gov and to Hon. Hon. Joseph Spence, Tarrant County Assistant District Attorney, at COAAppellateAlerts@TarrantCountytx.gov, on this the 21st day of January 2020, and an efiled-stamped copy will be deposited in first class U.S. mail addressed to:

Mr. Johnathan William Day
Appellant
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on this the 21st day of January 2020.

/s/Robert K. Gill
Robert K. Gill

CERTIFICATE OF COMPLIANCE

I hereby certify that in compliance with Tex. R. App. P. 9.4(i)(2)(B), the foregoing document contains 2,982 words, including/~~excluding~~ any parts exempted by Tex. R. App. P. 9.4(i)(2)(B). Signed on this the 21st day of January 2020.

/s/Robert K. Gill
Robert K. Gill